

# STATE OF MINNESOTA **EX PARTE OR LATE FILED**

OFFICE OF THE ATTORNEY GENERAL

HUBERT H. HUMPHREY III  
ATTORNEY GENERAL

**RECEIVED** October 23, 1998

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445 MINNESOTA STREET  
ST. PAUL, MN 55101-2130  
TELEPHONE: (612) 296-9412

OCT 30 1998

**Ex Parte**

Magalie Salas **FCC MAIL ROOM**  
Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D. C. 20554

Carol E. Matthey  
Chief, Policy & Program Planning Division  
Federal Communications Commission  
1919 M Street, N.W., Room 544  
Washington, D.C. 20554

**Re: In the Matter of the Petition of the State of Minnesota for a Declaratory Ruling, CC Docket No. 98-1**

Dear Ms. Salas and Ms. Matthey:

Enclosed please find a copy of three documents which update you on matters related to the Agreement for which the State of Minnesota has sought Declaratory Ruling.

The first document is an Assignment and Assumption of Rights Agreement between the State of Minnesota, ICS/UCN, Stone & Webster Engineering Corporation and LMAC Corporation. Stone & Webster was the engineering, procurement and construction partner of ICS/UCN. Stone & Webster has assigned its rights under the contract to LMAC Corporation pursuant to Article 19 of the Agreement. This change results in no change in the terms of the Agreement for which a Declaratory Ruling has been sought.

The second document is the First Amendment to Agreement (First Amendment) for which Declaratory Relief has been sought. The State respectfully requests that this change not impact the Commission's determination on the underlying agreement.

The First Amendment was developed in response to demand by potential collocating customers who wished to begin construction on the Moorhead to St. Cloud segment this season. The amendment establishes a mini-project along this route subject to the final disposition of current state court or FCC proceedings.

In the event of an adverse ruling, the State, pursuant to Section 2(a) which in relevant part states that:

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Facsimile: (612) 296-7438 • TTY: (612) 296-1410 • Toll Free Lines: (800) 657-3787 (Voice), (800) 366-4812 (TTY) • [www.ag.state.mn.us](http://www.ag.state.mn.us)

Company and LMAC agree and acknowledge that they are assuming all financial risk and consequences with respect to State that may arise out of subsequent inability or failure to satisfy those conditions precedent which, as set forth in subsection (b) below, need not be satisfied before Commencement of Construction of the First Phase 1 Segment but must be satisfied by the deadlines specified in subsection (b) below in order either to achieve Substantial Completion of the First Phase 1 Segment by the deadline required under this First Amendment or to proceed with Commencement of Construction of the balance of Phase 1, including but not limited to the risk of loss of the Network and potentially Equipment should the State exercise its right to terminate the Agreement by the reason of such inability or failure. State does not waive any such right of termination.

Thus, to the extent a final decision nullifies the grant of exclusive physical access, (the only issue before the Commission) the State can terminate the Agreement, take title to ICS/UCN fiber and no entity (including collocators) will have any right of exclusive physical access. Thus, the First Amendment does not disturb nor materially impact the comments already submitted to this Commission by the State or other parties.

The third document is a copy of a Complaint filed in Ramsey County District Court regarding the authority of the State of Minnesota to enter the Agreement. The Complaint, by the Minnesota Telephone Association (MTA) and Minnesota Equal Access Network System (MEANS), specifically references the pendency of the matter before the Commission and asserts that it is not seeking relief based upon the matters raised in the federal proceeding.

Thus, these changes present no reason for the Commission to delay its consideration of the State's Petition. The State of Minnesota continues to seek declaratory relief from the Commission as expeditiously as possible so as to give certainty to the plans of collocating customers and allow the balance of the project to go forward at the earliest possible date.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott Wilensky", written in a cursive style.

SCOTT WILENSKY  
Assistant Attorney General  
Residential and Small  
Business Utilities Division  
(651) 297-4609

## ASSIGNMENT, ASSUMPTION AND CONSENT

THIS ASSIGNMENT, ASSUMPTION AND CONSENT (the "Assignment") is made this 14<sup>th</sup> day of OCTOBER, 1998 by and among ICS/UCN LLC, a Colorado limited liability company ("Company"), LMAC, LLC, a Massachusetts limited liability company ("LMAC"), STONE & WEBSTER ENGINEERING CORPORATION, a Massachusetts corporation ("S&W") and THE STATE OF MINNESOTA (the "State"), acting by and through the Commissioner of the Department of Transportation ("MnDOT") and the Commissioner of the Department of Administration ("DOA").

### RECITALS

A. State, Company and S&W are parties to a certain Agreement to Develop and Operate Communications Facilities dated as of December 23, 1997 (the "Agreement").

B. Company and S&W desire to terminate their business relationship under the Agreement and to have S&W assign its rights and interests under the Agreement to LMAC.

C. Company is required to satisfy certain conditions in order to commence construction under the Agreement, and in order to satisfy such conditions and proceed with design and construction desires to engage LMAC to substitute for S&W under the Agreement.

D. LMAC desires to take an assignment of S&W's rights and assume S&W's obligations under the Agreement and to enter into a Key Contract with Company for engineering, procurement and construction services for the Project.

E. State is willing to approve such assignment and assumption subject to the terms and conditions of this Assignment.

NOW, THEREFORE, in consideration for the foregoing premises, the covenants contained herein and other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the parties hereto hereby agree as follows:

#### 1. Definitions.

(a) All capitalized terms used in this Assignment and not specifically defined in this Assignment have the respective meanings set forth in the Agreement.

(b) All definitions in the Agreement which include "S&W" in the name of the definition are hereby deemed to include the name "LMAC" in the place and stead of S&W.

2. **Assignment.** S&W hereby grants, assigns, transfers and sets over to LMAC all rights and interests of S&W under the Agreement, subject to all the terms and conditions of the Agreement.

3. **Assumption.** LMAC hereby accepts this Assignment and hereby assumes and agrees to perform all of the duties, obligations, liabilities, covenants, agreements, promises,

terms, conditions and provisions contained in the Agreement or Permits to be observed, kept, performed or complied with by S&W, including but not limited to the obligation to execute and deliver the LMAC Guaranty in form acceptable to State and including all obligations of S&W arising from and after the date the Agreement was executed. Without limiting the foregoing, LMAC assumes responsibility for all design and engineering work for the Project heretofore performed by S&W. The foregoing assumption shall not relieve Company of any of its obligations and liabilities owing to State under the Agreement.

**4. Release from Liability.** Neither State nor Company, on the one hand, nor S&W on the other hand, shall have any further obligation or liability to the other from and after the date of this Assignment, except as between Company and S&W as may be set forth in any separate agreement between them relating to S&W's withdrawal from the Agreement.

**5. Representations and Warranties of LMAC.**

(a) LMAC hereby represents and warrants to State as follows:

(i) LMAC is a limited liability company duly organized and created under the laws of the State of Massachusetts, has the requisite power and all required licenses to carry on its present and proposed activities, and has full power, right and authority to enter into this Assignment and to perform each and all of the obligations of LMAC assumed hereby or provided for herein.

(ii) LMAC has taken or caused to be taken all requisite action under its governing documents to authorize the execution and delivery of this Assignment and the performance of its respective obligations under this Assignment and the Agreement.

(iii) Each person executing this Assignment on behalf of LMAC has been duly authorized to execute this Assignment on behalf of LMAC.

(iv) Neither the execution and delivery by LMAC of this Assignment, nor the consummation of the transactions contemplated hereby and by the Agreement, is in conflict with the governing instruments of LMAC or any other agreements or instruments to which it is a party or by which it is bound.

(v) There is no litigation pending and served on LMAC which challenges LMAC's authority to execute, deliver or perform this Assignment or the Agreement, and LMAC has disclosed to State any threatened litigation with respect to such matters of which LMAC is aware. LMAC will disclose in writing to State any future pending or threatened litigation with respect to such matters when it obtains actual knowledge thereof.

(vi) LMAC is in material compliance with all applicable Laws and Regulations, including but not limited to those applicable to LMAC's activities in connection with the Agreement.

(vii) There has been no collusion with or exercise of undue influence over State or officers, officials or employees of State respecting (A) State's qualification and selection of LMAC to undertake the activities contemplated in the Agreement, (B) the consent to this Assignment or (C) LMAC's performance of the activities contemplated herein or in the Agreement.

(viii) All financial statements, financial information, resumes and information on the experience and expertise of LMAC which LMAC has heretofore provided to the State in writing is true, correct and complete in all material respects.

(b) The representations and warranties of LMAC contained herein shall survive expiration or earlier termination of the Agreement and any Permits.

**6. Status of Agreement and Network; No Waivers.**

(a) LMAC acknowledges and represents that it has had ample opportunity to investigate, understand and evaluate the current status of:

(i) the Network design and construction;

(ii) Company's financing for Network design, construction and operations;

(iii) the pending petition of the State before the Federal Communications Commission and opposition thereto concerning whether the Agreement satisfies Section 253 of the Telecommunications Act of 1996;

(iii) the pending state court litigation against the State challenging the validity of the Agreement and the State's authority to enter into and perform the Agreement;

(iv) the current negotiations between the State and Company regarding construction of a portion of Phase 1 during the 1998 and early spring 1999 construction season and regarding related modifications of the Agreement (the "First Amendment");

(v) Company's efforts to satisfy the conditions precedent to commencement of construction set forth in Section 5.5 of the Agreement;

(vi) Company's negotiations and proposed agreements with Collocating Customers, including but not limited to a proposed agreement with McLeodUSA Telecommunications Services, Inc.; and

(vii) all other aspects of the Network, the Agreement and performance or lack of performance of the Agreement.

(b) In entering into this Assignment, LMAC acknowledges that it has relied solely on its own investigation and evaluation described above and not on any promises, warranties or representations, express or implied, by State, all of which are hereby disclaimed.

(c) LMAC and Company recognize and acknowledge that:

(i) State has the right to review and approve or disapprove, among other things, LMAC's Key Contract with Company, the LMAC Guaranty, and Plans and Specifications for each portion of the Network;

(ii) State has not yet conducted such review, approval or disapproval and has not waived such rights either prior to or by signing this Assignment;

(iii) State and Company have not yet executed a First Amendment; and neither party has any obligation to do so or to agree upon any particular terms and conditions in a First Amendment; and

(iv) State has not waived any conditions precedent to commencement of construction under Section 5.5 of the Agreement, any other rights of State under the Agreement or any other terms, provisions or conditions of the Agreement.

(d) LMAC waives all right under Section 18.5 of the Agreement to an estoppel certificate from State in connection with this Assignment.

7. **Address for Notice.** Until further notice, the address for notice to LMAC under Section 20.2 of the Agreement shall be:

LMAC, LLC  
331 Northern Avenue  
Boston, Massachusetts 02210  
Attn: Gerard O'Brien  
Fax: (617) 426-5355

With a copy to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Attn: \_\_\_\_\_  
Fax: \_\_\_\_\_

8. **Consent.** State hereby consents to this Assignment and from and after the date hereof agrees to recognize LMAC in the place and stead of S&W under the Agreement. State hereby waives the requirement under Section 19.3 of the Agreement for 30 days prior notice of this Assignment.

9. **Counterparts.** This Assignment may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

**10. Governing Law.** This Assignment shall be governed, interpreted and construed in accordance with the laws of the State of Minnesota without regard to choice of law principles. Venue for any legal action (exclusive of appeals) arising out of this Assignment shall lie in Ramsey County, Minnesota.

**11. Acceptance by State.** This Assignment shall not become binding upon State unless and until executed by the Commissioner of MnDOT and the Commissioner of DOA or his or her authorized representative and approved in accordance with Minn. Stat. Ch. 16B.

IN WITNESS WHEREOF, the parties, intending to be legally bound, have executed this Assignment on the date first written above.

**ICS/UCN LLC,**  
a Colorado limited liability company

By: Universal Communication Networks, LLC,  
a Colorado limited liability company,  
its Manager

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**STONE & WEBSTER ENGINEERING  
CORPORATION,** a Massachusetts corporation

By:  \_\_\_\_\_

Name: J. David Holcombe

Title: Executive Vice President

8. **Consent.** State hereby consents to this Assignment and from and after the date hereof agrees to recognize LMAC in the place and stead of S&W under the Agreement. State hereby waives the requirement under Section 19.3 of the Agreement for 30 days prior notice of this Assignment.

9. **Counterparts.** This Assignment may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

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11. **Acceptance by State.** This Assignment shall not become binding upon State unless and until executed by the Commissioner of MnDOT and the Commissioner of DOA or his or her authorized representative and approved in accordance with Minn. Stat. Ch. 16B.

IN WITNESS WHEREOF, the parties, intending to be legally bound, have executed this Assignment on the date first written above.

ICS/UCN LLC,  
a Colorado limited liability company

By: Universal Communication Networks, LLC,  
a Colorado limited liability company,  
its Manager

By: 

Name: R. Stock

Title: Pres.

STONE & WEBSTER ENGINEERING  
CORPORATION, a Massachusetts corporation

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**LMAC, LLC, a Massachusetts limited liability company**

By: 

Name: GERARD O'BRIEN

Title: PRES/MGR.

**THE STATE OF MINNESOTA,  
acting by and through:**

**The Commissioner of the  
Department of Transportation**

By: 

Name: JAMES N. DENN

Title: Commissioner

and

**The Commissioner of the  
Department of Administration**

By: 

Name: ELAINE HANSEN

Title: COMMISSIONER

**Approved as to form and execution:**

By: 

Donald J. Muehling, Esq., Assistant Attorney General,  
State of Minnesota

By:  10-14-98

Scott Wilensky, Esq., Assistant Attorney General,  
State of Minnesota

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OCT 30 1998

FCC MAIL ROOM

**FIRST AMENDMENT TO  
AGREEMENT TO DEVELOP AND  
OPERATE COMMUNICATIONS FACILITIES**

THIS FIRST AMENDMENT TO AGREEMENT TO DEVELOP AND OPERATE COMMUNICATIONS FACILITIES (the "First Amendment") is made and entered into as of October 19, 1998 among THE STATE OF MINNESOTA (the "State"), acting by and through the Commissioner of the Department of Transportation ("MnDOT") and the Commissioner of the Department of Administration ("DOA"), ICS/UCN LLC, a Colorado limited liability company ("Company"), and LMAC, LLC, a Massachusetts limited liability company ("LMAC"), with reference to the following facts:

A. State, Company and LMAC, as successor in interest to Stone & Webster Engineering Corporation, a Massachusetts corporation ("S&W"), are parties to that certain Agreement to Develop and Operate Communications Facilities dated as of December 23, 1997 (the "Agreement").

B. Company has received considerable interest from telecommunications carriers desiring to collocate fiber optic facilities with Company's Network in certain routes within Phase 1 provided Company is able to install such facilities without delay and such carriers are reasonably assured that they will have the right to continue to deploy and use such facilities within Right of Way despite any early termination of the Agreement.

C. Company and LMAC desire to promptly commence construction of the Network and such other fiber optic facilities in the route between Moorhead and St. Cloud, Minnesota, but are not yet in a position to satisfy all conditions precedent required under the Agreement for Commencement of Construction of Phase 1 of the Network.

D. State is willing to permit Company and LMAC to construct the Network and such other fiber optic facilities in such route, subject to the terms and conditions set forth in this First Amendment.

NOW, THEREFORE, in consideration of the covenants contained herein and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, State, Company and LMAC agree as follows:

**1. Definitions.**

(a) All capitalized terms used in this First Amendment but not defined herein have the respective meanings set forth in the Agreement.

(b) The following terms have the following meanings:

(i) "Balance of Phase 1" means all or any portion of Phase 1 other than the First Phase 1 Segment.

(ii) "Company's Letter of Representations" means the certain letter from Company to Adeel Lari of MnDOT dated October 6, 1998 concerning certain conditions precedent to Commencement of Construction.

(iii) "First Phase 1 Segment" means the portion of Phase 1 consisting of approximately 175 miles between Moorhead and St. Cloud, Minnesota, as more particularly shown on Exhibit A to the Agreement.

(iv) "Legal Proceedings" means the pending legal proceedings (A) before the Federal Communications Commission to establish the validity of certain provisions of the Agreement under the Telecommunications Act of 1996 and (B) in Minnesota state court to determine the authority of the State to enter into the Agreement and grant to Company and LMAC their respective rights under the Agreement.

(v) "LMAC's Letter of Representations" means the certain letter from LMAC to Adeel Lari of MnDOT dated October 1, 1998 concerning certain conditions precedent to Commencement of Construction.

(c) Subsection (c) in the definition of Collocating Customer (Section 2.9 of the Agreement) is hereby modified to read in its entirety as follows:

"(c) for which Company installs fiber optic cable or fiber optic strands and equipment and, at Company's option, conduit or innerducts, that is separate and distinct from, collocated with, and installed concurrently with Company's installation of, the fiber optic cable and Equipment for the Network. Fiber optic strands of a third party are considered separate and distinct even if they are within a common sheath, innerduct or conduit provided that such strands are separately owned by or subject to an indefeasible right of use in favor of the third party and are lit and operated by equipment separate from Company's Equipment. Fiber optic cable need not be installed concurrently if it can subsequently be pulled or blown through an existing sheath, innerduct or conduit either (a) without physical entry of personnel or vehicles onto Right of Way or (b) at a location away from traveled lanes of Right of Way (e.g. rest areas, interchanges) and without disrupting or otherwise impairing the safe use of such traveled lanes, as determined by MnDOT (in which case such subsequently installed cable will be part of the

facilities of the Collocating Customer for purposes of this Agreement).”

(d) The definition of Network (Section 2.38 of the Agreement) is hereby amended to include all rights Company may have at any time (i) to use conduit or innerduct of a Collocating Customer or (ii) to own or use cable or fiber located in conduit or innerduct of a Collocating Customer, and all equipment of Company used to light or operate any such cable or fiber.

## **2. Conditions Precedent to Commencement of Construction.**

(a) In order to expedite the construction and installation of the First Phase 1 Segment, the parties agree to modify application of the conditions precedent to Commencement of Construction set forth in Section 5.5 of the Agreement. For purposes of Section 5.7(c) of the Agreement, the First Phase 1 Segment is declared and agreed to be a priority location of Phase 1. Company and LMAC agree and acknowledge that they are assuming all financial risk and consequences with respect to State that may arise out of subsequent inability or failure to satisfy those conditions precedent which, as set forth in subsection (b) below, need not be satisfied before Commencement of Construction of the First Phase 1 Segment but must be satisfied by the deadlines specified in subsection (b) below in order either to achieve Substantial Completion of the First Phase 1 Segment by the deadline required under this First Amendment or to proceed with Commencement of Construction of the Balance of Phase 1, including but not limited to the risk of loss of the Network and potentially Equipment should the State exercise its right to terminate the Agreement by reason of such inability or failure. State does not waive any such right of termination.

(b) The conditions precedent set forth in Section 5.5 of the Agreement applicable to the First Phase 1 Segment, and the schedule for satisfying conditions precedent applicable to Commencement of Construction of the Balance of Phase 1, are as follows (with all references being to subsections of Section 5.5 of the Agreement).

### 5.5(a) Sufficiency of financing:

- Required before commencing First Phase 1 Segment, as to satisfactory evidence of firm financing sufficient to design, construct, test and accept the First Phase 1 Segment.
- Contingency for Balance of Phase 1 must be satisfied prior to any other construction.

### 5.5(b) Agreement on measuring State use of capacity and average capacity:

- Postpone; satisfaction is required by April 1, 1999.

5.5(c) MEPA/NEPA compliance; no alternative project selected:

- State reserves the right to determine whether an environmental assessment or environmental impact statement under MEPA or NEPA for the proposed Network and facilities of Collocating Customers is required.
- Company may proceed if State determines that no such assessment or statement is required.
- Company shall bear all risk of proceeding prior to compliance with MEPA/NEPA.

5.5(d) Approval of Plans and Specifications:

- Required before commencing First Phase 1 Segment, as to First Phase 1 Segment, including facilities of Collocating Customers in First Phase 1 Segment.
- Contingency for Balance of Phase 1 must be satisfied prior to any other construction.

5.5(e) Approval of construction segmenting plan and sequencing schedule:

- The parties hereby designate the entire First Phase 1 Segment as a "Construction Segment" under the Agreement.
- Contingency for balance of construction segmenting plan of Phase 1 must be satisfied prior to any other construction.
- Not later than February 1, 1999, Company and LMAC shall submit to State a proposed sequencing schedule as described in Section 10.6 of the Agreement, grouped into three groups corresponding with the 1998, 1999 and 2000 construction seasons, as such seasons are extended pursuant to Section 4(b) below or otherwise by operation of Section 10.4 of the Agreement. The first grouping shall include but not be limited to the First Phase 1 Segment and a Network operations function which provides the capability of the Network Operations Center described in Exhibit C to the Agreement. The parties shall thereafter timely meet and confer on such sequencing schedule in order to finalize a mutually acceptable sequencing schedule by not later than April 1, 1999. Contingency regarding such sequencing schedule must be satisfied prior to any other construction.

5.5(f) Permits obtained:

- Required prior to commencing First Phase 1 Segment, as to First Phase 1 Segment.
- Contingency for Balance of Phase 1 must be satisfied prior to any other construction.

5.5(g) Approval of final Performance Standards and final O,A&M Plan:

- Postpone; satisfaction is required as to all Phase 1 (i) as condition to issuing notice of and concurrence with Substantial Completion of First Phase 1 Segment under Section 6.1(c) of the Agreement and (ii) prior to any other construction.

5.5(h) Approval of contracting plan under Section 9.1(a) of the Agreement:

- Required before commencing First Phase 1 Segment, as to all Phase 1.

5.5(i) Agreement on schedule of liquidated damages for:

- Completion of ITS/TMC work - postpone; must be satisfied prior to any other construction.
- Failure to meet Performance Standards - postpone; satisfaction is required as to all Phase 1 (i) as condition to issuing notice of and concurrence with Substantial Completion of First Phase 1 Segment under Section 6.1(c) of the Agreement and (ii) prior to any other construction.

5.5(j) Submission and approval of Key Contracts:

- Key Contract between Company and LMAC - required as to all Phase 1 before commencing First Phase 1 Segment.
- Prime construction contract - not applicable. Company and LMAC hereby warrant and represent to State that LMAC is the prime construction contractor under the Key Contract between Company and LMAC.
- Equipment vendor contract - postpone; must be satisfied as to First Phase 1 Segment prior to any purchase or installation of equipment for Network within First Phase 1 Segment; contingency for Balance of Phase 1 must be satisfied prior to any other construction.
- O,A&M contract - postpone; satisfaction is required as to First Phase 1 Segment as condition to issuing notice of and concurrence with Substantial

Completion of First Phase 1 Segment under Section 6.1(c) of the Agreement: contingency for Balance of Phase 1 must be satisfied prior to any other construction.

- Test bed facility contract - postpone; satisfaction is required as to all of Phase 1 (i) as condition to issuing notice of and concurrence with Substantial Completion of First Phase 1 Segment under Section 6.1(c) of the Agreement and (ii) prior to any other construction.
- Financing agreements - required in accordance with Section 5.5(a) above before commencing First Phase 1 Segment, as to First Phase 1 Segment: contingency for Balance of Phase 1 must be satisfied prior to any other construction.

5.5(k) Warranty and guaranty of Network performance per Performance Standards (per Section 7.3(c) of the Agreement):

- Postpone; satisfaction is required as to First Phase 1 Segment as condition to issuing notice of and concurrence with Substantial Completion of First Phase 1 Segment under Section 6.1(c) of the Agreement.
- Contingency for Balance of Phase 1 must be satisfied prior to any other construction.

5.5(l) and (m) No adverse change in financial condition of:

- Company - Company hereby confirms the continuing truth and accuracy of its warranty and representation to State regarding this contingency set forth in Company's Letter of Representations. In reliance on Company's Letter of Representations and such confirmation, State hereby declares this condition precedent satisfied as to Company regarding the First Phase 1 Segment.
- LMAC - LMAC hereby confirms the continuing truth and accuracy of its warranty and representation to State regarding this contingency set forth in LMAC's Letter of Representations. In reliance on LMAC's Letter of Representations and such confirmation, State hereby declares this condition precedent satisfied as to LMAC regarding the First Phase 1 Segment.
- Other Key Contract contractors - not applicable to First Phase 1 Segment; must be satisfied as to Balance of Phase 1 prior to any other construction.

5.5(n) Names, addresses, trades of all contractors and subcontractors:

- Required prior to commencing First Phase 1 Segment, as to First Phase 1 Segment.

- Contingency for Balance of Phase 1 must be satisfied prior to any other construction.

5.5(o) Article IX compliance:

- Key Contracts to meet requirements of Section 9.1(c) of the Agreement - required in accordance with the schedule set forth in Section 5.5(j) of this First Amendment; contingency for Balance of Phase 1 must be satisfied prior to any other construction.
- User Agreements to meet requirements of Section 9.2 of the Agreement - required as to each First Phase 1 Segment User Agreement prior to first to occur of (i) execution of the User Agreement, (ii) any entry onto Right of Way by any employee or agent of the user or Collocating Customer intended to be the party to the User Agreement or (iii) use or operation of the Network or facilities of Collocating Customers by or for the benefit of such intended user or Collocating Customer; contingency for Balance of Phase 1 must be satisfied prior to any other construction.
- Non-discrimination (Section 9.3 of the Agreement) - Each of Company and LMAC hereby severally warrants and represents to State that it is in compliance with Section 9.3 of the Agreement. In reliance on the foregoing warranties and representations, State hereby declares this condition precedent satisfied as to Company and LMAC regarding the First Phase 1 Segment.
- DBE utilization; affirmative action; equal employment opportunity; prevailing wage (Sections 9.4, 9.5 and 9.6 of the Agreement) - Company and LMAC shall continue to work and communicate with the MnDOT Office of EEO Contract Management to comply with and implement the provisions of Sections 9.4, 9.5 and 9.6 of the Agreement. Company and LMAC must receive EEO Contract Management clearance regarding such compliance as a continuing obligation.
- All necessary professional licenses (Section 9.7 of the Agreement) - LMAC hereby warrants and represents to State that all contractors, subcontractors and other third parties performing work on the First Phase 1 Segment are or will be licensed in accordance with all applicable Laws and Regulations. In reliance on the foregoing warranty and representation, State hereby declares this condition precedent satisfied as to Company and LMAC regarding the First Phase 1 Segment.
- Drug-free policy in place (Section 9.8 of the Agreement) - Required prior to commencing First Phase 1 Segment, as to all of Phase 1.

5.5(p) LMAC Guaranty:

- Required prior to commencing First Phase 1 Segment, as to all of Phase 1.

5.5(q) Reserve funding agreements with Lenders signed and approved, per Section 12.2(b) of the Agreement:

- Postpone; satisfaction is required as to First Phase 1 Segment by April 1, 1999.
- Contingency for Balance of Phase 1 must be satisfied prior to any other construction.

5.5(r) Payment and performance bonds:

- To the extent bonding is required under the contracting plan State approves pursuant to Section 9.1(a) of the Agreement, such bonds are required prior to commencing First Phase 1 Segment, as to First Phase 1 Segment.
- Contingency for Balance of Phase 1 must be satisfied prior to any other construction.

5.5(s) Proof of insurance policies and coverage (per Section 13.5(c)(iii) of the Agreement):

- Required prior to commencing First Phase 1 Segment, as to First Phase 1 Segment.
- Contingency for Balance of Phase 1 must be satisfied prior to any other construction.

5.5(t) Notice of Company and LMAC agents during construction:

- Required prior to commencing First Phase 1 Segment, as to First Phase 1 Segment.
- Contingency for Balance of Phase 1 must be satisfied prior to any other construction.

5.5(u) Submission and approval of quality control/quality acceptance and safety manuals for:

- LMAC - required prior to commencing First Phase 1 Segment, as to all Phase 1;

- Systems integration and testing contractor or subcontractor (if other than LMAC) - postpone; satisfaction is required as to First Phase 1 Segment as condition to issuing notice of and concurrence with Substantial Completion of the First Phase 1 Segment under Section 6.1(c) of the Agreement; contingency for Balance of Phase 1 must be satisfied prior to any other construction.
- O,A&M contractor - postpone; satisfaction is required as to First Phase 1 Segment as condition to issuing notice of and concurrence with Substantial Completion of the First Phase 1 Segment under Section 6.1(c) of the Agreement; contingency for Balance of Phase 1 must be satisfied prior to any other construction.

5.5(v) No pending or threatened litigation:

- Company - Company hereby confirms the continuing truth and accuracy of its warranty and representation to State regarding this contingency set forth in Company's Letter of Representations. In reliance on Company's Letter of Representations and such confirmation, State hereby declares this condition precedent satisfied as to Company regarding the First Phase 1 Segment.
- LMAC - LMAC hereby confirms the continuing truth and accuracy of its warranty and representation to State regarding this contingency set forth in LMAC's Letter of Representations. In reliance on LMAC's Letter of Representations and such confirmation, State hereby declares this condition precedent satisfied as to LMAC regarding the First Phase 1 Segment.
- State hereby agrees that Company and LMAC may commence construction of the First Phase 1 Segment notwithstanding the pendency of the Legal Proceedings. Company and LMAC hereby warrant and represent that each of them has had ample opportunity to inquire into and investigate the allegations, issues and material facts raised in the Legal Proceedings, understands such allegations, issues and material facts and has independently determined to proceed with construction of the First Phase 1 Segment despite the pendency of the Legal Proceedings. Company and LMAC agree and acknowledge that they are assuming all financial risk and consequences with respect to State of any subsequent adverse result in either of the Legal Proceedings, including but not limited to the risk of loss of the Network and potentially Equipment should the State exercise its right to terminate the Agreement under Section 15.2(a)(ii) or (iii) by reason of such adverse result. State does not waive any such right of termination.

5.5(w) Submission of agreements, licenses, rights as to Intellectual Property:

- Postpone; satisfaction is required as to First Phase 1 Segment by April 1, 1999.

- Contingency for Balance of Phase 1 must be satisfied prior to any other construction.

5.5(x) State receipt of list of bonds, security deposits, etc. required to be filed with utilities, governmental authorities:

- Required prior to commencing First Phase 1 Segment, as to those currently known or obtained for First Phase 1 Segment; Company and LMAC shall augment such list as necessary to keep it current during the course of construction of the First Phase 1 Segment, as required by Section 5.8(f) of the Agreement.
- Contingency for Balance of Phase 1 must be satisfied prior to any other construction.

5.5(y) No defaults existing:

- Company - Company hereby confirms the continuing truth and accuracy of its warranty and representation to State regarding this contingency set forth in Company's Letter of Representations. In reliance on Company's Letter of Representations and such confirmation, State hereby declares this condition precedent satisfied as to Company regarding the First Phase 1 Segment.
- LMAC - LMAC hereby confirms the continuing truth and accuracy of its warranty and representation to State regarding this contingency set forth in LMAC's Letter of Representations. In reliance on LMAC's Letter of Representations and such confirmation, State hereby declares this condition precedent satisfied as to LMAC regarding the First Phase 1 Segment.
- Contingency for Balance of Phase 1 must be satisfied prior to any other construction.

5.5(z) Representations and warranties remain true and correct:

- Company recognizes and acknowledges that by commencing construction of the First Phase 1 Segment and each subsequent Construction Segment it is deemed to affirm the continuing truth and accuracy of its warranties and representations made in the Agreement.
- LMAC recognizes and acknowledges that by commencing construction of the First Phase 1 Segment and each subsequent Construction Segment it is deemed to affirm the continuing truth and accuracy of its warranties and representations made in the certain Assignment, Assumption and Consent among LMAC, Company, S&W and State pursuant to which LMAC accepted

an assignment of S&W's rights and assumed S&W's obligations under the Agreement.

(c) All the foregoing conditions precedent which are not stated herein to be satisfied shall be deemed satisfied only when State delivers to Company written confirmation thereof, as provided in Section 5.7(a) of the Agreement.

### **3. Recognition and Assumption of Certain User Agreements.**

(a) To the extent permitted by Laws and Regulations, State agrees that in the event it exercises any right to terminate the Agreement prior to the end of the Term pursuant to Section 15.2 of the Agreement it will recognize and assume any User Agreement with a Collocating Customer if and only if the following requirements are satisfied:

(i) The User Agreement must pertain only to fiber optic facilities of Collocating Customers located within the First Phase 1 Segment;

(ii) The User Agreement must be in form and substance approved in writing by State, which approval State will not unreasonably withhold if such User Agreement is substantially similar to that entitled "FIBER OPTIC CONSTRUCTION AGREEMENT" and labeled "DRAFT 10/9/98," proposed between Company and McLeodUSA Telecommunications Services, Inc., but with all of the changes made and concerns rectified which were set forth in a certain letter to Al Strock from Adeel Lari dated October 13, 1998;

(iii) as provided in Section 5.12(d) of the State Agreement, State has received and had the opportunity to review, comment on and approve or disapprove the plans and specifications for the facilities of the Collocating Customer, and the Collocating Customer has satisfied any comments on or reasons given for disapproval of such plans and specifications;

(iv) all the other requirements set forth in Section 5.12 of the Agreement are satisfied;

(v) Prior to execution of the User Agreement the Collocating Customer shall have signed and delivered to State a certificate in which the Collocating Customer acknowledges receipt of a true and correct copy of the Agreement, with all Exhibits attached thereto, this First Amendment and any other then-existing written amendments to the Agreement; and

(vi) Prior to execution of any User Agreement Company shall have submitted to State true and complete written schedules identifying and describing Company's various classifications of Collocating Customers and potential Collocating Customers and the rates and charges applicable to each such classification, in compliance with Section 7.7 of the Agreement.

(b) Notwithstanding any contrary provisions of any such User Agreement, in the event State exercises its right of termination under Section 15.2 of the Agreement and assumes the User Agreement, then State:

(i) shall not be bound by any obligation of Company or LMAC to design, engineer, construct, install, test or inspect any facilities of the Collocating Customer, to pay liquidated damages or any other damages by reason of delay in completing such design, engineering, construction, installation, testing or inspection, or to pay or reimburse the Collocating Customer for its purchase of any materials or equipment;

(ii) shall not be liable for any prior or continuing default or breach by Company or LMAC under the User Agreement;

(iii) shall not be liable for the return to the Collocating Customer of any sums of money it may have previously paid to or deposited with Company or LMAC or paid into any escrow for the benefit of Company or LMAC;

(iv) shall not be subject to any right to offset or reduce payments or obligations the Collocating Customer may owe to State by any sums or liabilities Company or LMAC may owe to the Collocating Customer;

(v) shall not be bound by any contractual indemnity, hold harmless or similar obligation of Company or LMAC to the Collocating Customer (provided that the foregoing does not affect any right to contribution or indemnity that may be available at law);

(vi) shall not be bound by any warranties or representations, express or implied, made or given by Company or LMAC under the User Agreement;

(vii) shall not be liable for any indirect, special, punitive or consequential damages to the Collocating Customer, all of which shall be deemed forever waived and released as against State upon the State's assumption of the User Agreement;

(viii) shall not be bound by any obligation of Company or LMAC to carry insurance, and shall have the right to require the Collocating Customer to carry all risk and automobile liability insurance coverage and worker's compensation/employers' liability insurance coverage in amounts and on other terms as provided in Sections 13.5(b)(i), (ii) and (iii) and 13.5(c) of the Agreement, in lieu of liability or worker's compensation insurance provisions in the User Agreement;

(ix) shall have no obligation to pay any relocation costs of the Collocating Customer, or to protect against adverse change to the operations, performance or connection points within the facilities of the Collocating Customer or the end points of its facilities, in connection with any relocation State or the Collocating Customer may request; and

(x) shall have the right to subsequently assign the User Agreement to any third party without consent, and shall cease to have any obligations or liabilities to the Collocating Customer for the performance of the User Agreement from and after the date State assigns the User Agreement to any third party.

(c) Notwithstanding any contrary provisions of any such User Agreement, in the event State terminates the Agreement and assumes the User Agreement the resolution of any disputes between State and the Collocating Customer shall be governed by the dispute resolution procedures set forth in Section 16.7 of the Agreement.

(d) If and when State approves Plans and Specifications which depict the locations of the Collocating Customer's nodes and equipment in the First Phase 1 Segment, State shall not have any further right under Section 5.12(e) of the Agreement to change or further limit such locations; provided that:

(i) State's approval shall not in any way relieve the obligation of Company and LMAC to comply with all applicable Laws and Regulations, the Utility Accommodation Policy and all Regulatory Approvals in accordance with the terms of the Agreement;

(ii) Section 13.1 of the Agreement shall continue to apply with full force and effect; and

(iii) the foregoing provision does not affect or impair any of State's rights under Sections 5.10, 11.2 and 11.4 of the Agreement.

(e) If and when State approves Plans and Specifications for the First Phase 1 Segment which depict huts and pedestals having sufficient design and space for the Equipment, State's equipment and the equipment of the Collocating Customer, the Collocating Customer shall have the right to use the portion thereof designated for its equipment, without regard to the provisions of Section 5.12(f) of the Agreement. However, in the event such design or space subsequently proves to be insufficient to fulfill State's rights of access to and use of space in Company's huts and pedestals as provided in Section 3.3(g) of the Agreement, Company shall be obligated to promptly install such additional hut and pedestal space as is necessary to meet State's rights thereto, at Company's sole expense, notwithstanding any contrary provision of Section 3.3(g) of the Agreement.

(f) Section 9.2(c) of the Agreement, which provides that the User Agreement shall be subject and subordinate to the Agreement, shall not impair or affect State's covenant to recognize and assume the User Agreement if the requirements in subsections (a), (b) and (c) above are satisfied.

(g) MnDOT shall process and issue to Collocating Customers in the First Phase 1 Segment Permits or Permit renewals upon application according to MnDOT's then-current rules, regulations, policies and guidelines, consistent with any limited rights of access available to the Collocating Customer under the Agreement or under a Collocation Agreement approved by MnDOT. MnDOT shall not revoke any such Permits, and shall continue issuing Permits and Permit renewals as described above, after any termination of the Agreement and assumption of the Collocating Customer's User Agreement pursuant to this Section 3, notwithstanding any contrary provision of Section 15.3 or 16.3(b)(ii) of the Agreement. No such Permits or Permit renewals shall extend beyond the term of the User Agreement or the Agreement.

#### 4. Schedules and Milestones.

(a) The milestones set forth in Table 1 of the Schedule of Performance are hereby superseded and replaced by the provisions of Section 2 of this First Amendment, except for the milestone entitled "Substantially Complete TMC Design, Plans and Specifications for Year 1 Construction Satisfied", which is hereby changed to two months before Commencement of Construction of any portion of the Network other than the First Phase 1 Segment.

(b) State, Company and LMAC agree and acknowledge that the milestones set forth in Table 2A of the Schedule of Performance have been extended by operation of Section 10.4 of the Agreement due to the pendency of the Legal Proceedings. As of October 1, 1998, the period of such extension equals six months (except for the first milestone, the extension of which is governed by subsection (c) below). No milestone set forth in Table 2A of the Schedule of Performance shall be subject to any further extension by reason of the pendency of either of the Legal Proceedings, except for (i) the period of time, if any, that Company and LMAC are prevented from performing work due to issuance in the Minnesota state court case of a court order to stop work or (ii) the period of time, if any, that either of the Legal Proceedings remains pending and undecided from and after April 1, 1999, provided that the requirements for extension under Sections 10.4(a) and (c) of the Agreement are satisfied.

(c) The first milestone set forth in Table 2A of the Schedule of Performance is hereby modified to be the milestone for Commencement of Construction of the Balance of Phase 1, and the deadline to complete such milestone is hereby changed to 4/1/99.

(d) There is hereby added to Table 2A of the Schedule of Performance the following new milestone:

<u>Milestone</u>	<u>Agreement Section Reference</u>	<u>Responsibility</u>	<u>Date Complete</u>	<u>Remarks</u>
Cutover Date for First Phase 1 Segment	Not applicable	Company/LMAC	6/15/99	Not applicable

The pendency of the Legal Proceedings in no event shall constitute an event of Force Majeure with respect to the foregoing milestone for cutover of the First Phase 1 Segment, except for the period of time, if any, that Company and LMAC are prevented from performing work due to issuance in the Minnesota state court case of a court order to stop work.

(e) The first milestone in Table 2B of the Schedule of Performance is hereby deemed to be the Commencement of Construction of the Balance of Phase 1; and the date to complete such milestone is hereby changed to 12/1/99. No other dates to complete set forth in Table 2B are changed.

(f) Neither the designation of the First Phase 1 Segment, nor the commencement of construction of the First Phase 1 Segment, constitutes (i) State's waiver of its right to priority scheduling of portions of Phase 1 corresponding with TMC segments in the eastern sector of the seven county Minneapolis-St. Paul metropolitan area, as provided in Section 10.5(b) of the Agreement, or (ii) State's agreement to the First Phase 1 Segment as the Year 1 Scope for purposes of Section 10.6 of the Agreement or Tables 2A and 2B of the Schedule of Performance.

(g) Company and LMAC shall prepare and submit to State their proposed Acceptance Test Plan not later than February 1, 1999. The foregoing deadline replaces the time period set forth in Section 6.2(a) of the Agreement.

(h) Company acknowledges and agrees that its right of negotiation under Section 11.7 of the Agreement has expired.

(i) The parties hereby extend the date for selecting a list of arbitrators for Design and Construction Claims as provided in Section 16.7(d)(i) of the Agreement to 60 Days after the date of this First Amendment.

(j) Company and LMAC may proceed with testing, acceptance and cutover of the facilities of Collocating Customers according to schedules and procedures agreed upon with the Collocating Customer, even though such schedules or procedures may differ from those applicable to the Network, subject, however, to all limitations on entry onto Right of Way set forth in the Agreement or otherwise approved by State. Company and LMAC shall deliver to State written notice of such schedules and any changes thereto promptly after such schedules or changes are determined.

## **5. Use of Revenues from User Agreements.**

(a) Until the final Acceptance of all of Phase 1 of the Network, Company shall use and apply all gross revenues received or derived from User Agreements (including but not limited to User Agreements with Collocating Customers) solely for the purposes of (i) funding the costs of designing, permitting, constructing, installing, testing, completing, operating, maintaining and repairing the Network in Phase 1 and facilities of Collocating Customers in Phase 1 (collectively "Costs"), (ii) funding of the Maintenance Fund and Technology Upgrade Fund or (iii) providing cash security to Lenders to secure financing of Costs.

(b) All such revenues not pledged to and held by Lenders in accounts under their control and not yet needed for paying Costs or funding the Maintenance Fund or Technology Upgrade Fund shall be held in one or more escrow accounts with an independent escrow agent and shall be accounted for separately from any other funds of Company. Company shall deliver to State, prior to receipt of any revenues from any User Agreement, proof of the arrangements by which Lenders will hold and control such revenues or of escrow arrangements for holding and dispersing such revenues. Such arrangements shall be subject to State's prior written approval, which shall not be unreasonably withheld or delayed.

(c) Company shall maintain books and records, in accordance with Section 17.1 of the Agreement, of the receipt, deposit and disbursement of all such revenues, of all Costs paid with such revenues, and of all deposits of such revenues into the Maintenance Fund and Technology Upgrade Fund; and the same shall be subject to inspection, audit and reaudit in accordance with Section 17.2 of the Agreement. Until final Acceptance of all of Phase 1 of the Network, the annual financial reports under Section 17.4(a) of the Agreement shall include for each Fiscal Year the amount of such revenues (by User Agreement and in total), the amount of Costs paid with such revenues, and the amount of such revenues deposited in each of the Maintenance Fund and Technology Upgrade Fund.

(d) Until the final Acceptance of all of Phase 1 of the Network, Costs shall not include any development fee, management fee or other fee or compensation to Company, direct or indirect, in any manner related to development of the Network. Costs may include, however, Company's documented actual and reasonable overhead and administrative costs directly attributable to designing, permitting, constructing, installing, testing and completing the Network in Phase 1.

#### **6. Limitation on Liability.**

(a) Notwithstanding any contrary provision of the Agreement, State shall have no remedy under Section 16.3(a), 16.3(b)(v) or 16.3(d) of the Agreement, and neither Company nor LMAC shall have any liability in damages (including but not limited to damages under Section 16.3(b)(vii) or (viii) of the Agreement, consequential damages and costs and expenses State incurs), for breach of obligations respecting the Balance of Phase 1, in the following circumstance:

(i) Company commits a Company Default consisting of the failure to achieve Commencement of Construction of the Balance of Phase 1 by the deadline therefor (as provided in Sections 4(b) and (c) above);

(ii) the primary active cause of such failure is Company's inability to obtain financing adequate to satisfy the condition precedent to such Commencement of Construction set forth in Section 5.5(a) of the Agreement (as amended by this First Amendment);

(iii) Company undertook diligent efforts to satisfy such condition precedent;  
and

(iv) the Agreement is terminated without Commencement of Construction of the Balance of Phase 1.

(b) Nothing in subsection (a) above limits any other remedy available to State under the Agreement, including but not limited to the right to terminate the Agreement by reason of such Company Default and any and all remedies available to State under the Agreement due to Company's or LMAC's breach of obligations respecting the First Phase 1 Segment.

**7. Company's and LMAC's Rights to Terminate.**

(a) Notwithstanding the Commencement of Construction of the First Phase 1 Segment, Company shall continue to have the right to terminate the Agreement pursuant to Section 15.1(b), 15.2(a), 15.2(c)(iii) or 15.2(c)(iv) of the Agreement.

(b) Company agrees and acknowledges that by virtue of Commencement of Construction of the First Phase 1 Segment, Company shall no longer have any right to terminate the Agreement under Sections 15.2(c)(i) and (ii) of the Agreement, except that Company shall continue to have the right to terminate the Agreement if it is unable, despite diligent efforts, to satisfy the condition precedent to Commencement of Construction of the Balance of Phase 1 set forth in Section 5.5(a) of the Agreement (as amended by this First Amendment) (without limiting, however, State's remedies preserved under Section 6 above).

(c) LMAC agrees and acknowledges that by virtue of Commencement of Construction of the First Phase 1 Segment, LMAC shall no longer have any right to terminate its obligations under the Agreement or the LMAC Guaranty pursuant to Sections 15.7(a)(i) and (ii) of the Agreement.

(d) For purposes of Sections 15.1(c), 15.1(d)(ii), (iii) and (iv), 15.2(b), 15.2(c)(iii) and (iv), and 15.7(a)(iv) of the Agreement, "Commencement of Construction" or "Commencement of Construction on Phase 1" refers to Commencement of Construction of the Balance of Phase 1.

**8. Miscellaneous.**

(a) Company and LMAC agree and acknowledge that by virtue of Commencement of Construction of the First Phase 1 Segment, they will become obligated:

(i) as provided in Sections 3.2(b) and 5.8(a) of the Agreement, to construct and complete the entirety of Phase 1 and to provide to State the capacity, services and other consideration set forth in Section 3.3 (except Section 3.3(i)) of the Agreement, provided that State's remedies for breach of such obligation may be limited as provided in Section 6 above and Company and LMAC shall continue to have rights to terminate as provided in Section 7 above; and

(ii) to prepare and deliver to State written narrative reports as and when provided in Section 17.4(b) of the Agreement.

(b) Company confirms and acknowledges that any interest it (or, with respect to Section 3.1(b)(ix) of the Agreement, any Company Related Party) may have in acquiring, exchanging or using fiber of Collocating Customers is and shall remain restricted by Sections 3.1(b)(viii) and (ix) of the Agreement. Company agrees that the provisions of Sections 3.1(b)(viii) and (ix) of the Agreement shall apply with equal force and effect to any fiber which Company (or, with respect to Section 3.1(b)(ix) of the Agreement, any Company Related Party)

may desire to own, control or use in conduit or innerduct which is a part of Collocating Customer facilities.

(c) For purposes of Sections 5.12(a) and (b), Collocating Customer fiber optic cable or strands shall be considered separate and distinct from fiber optic cable and strands for the Network, and shall be considered owned and operated by the Collocating Customer separately from the Network, even if they are within a common sheath, innerduct or conduit, provided that such strands are separately owned by or subject to an indefeasible right of use in favor of the Collocating Customer and are lit and operated by equipment separate from Company's Equipment.

(d) Section 5.12(g) of the Agreement is hereby amended to read in its entirety as follows:

“(g) all construction, installation, inspection, testing, acceptance, maintenance, repair, relocation and removal work for Collocating Customer facilities located in Right of Way or on other State property shall be performed solely by Company or LMAC and their respective subcontractors;”.

(e) For purposes of Section 6.1(d) of the Agreement, “laying additional fiber” means and includes plowing, pulling, blowing or other method of installing additional fiber in the subject Right of Way, or the connection of any additional fiber to equipment, where any such activity will entail physical entry of personnel or vehicles into Right of Way, except for pulling, blowing or other method of installing additional fiber into existing conduit if such activity can occur at a location away from traveled lanes of Right of Way (e.g. rest areas, interchanges) and without disrupting or otherwise impairing the safe use of such traveled lanes, as determined by MnDOT.

(f) Except as expressly modified hereby, the Agreement remains unchanged and in full force and effect. In the event of any irreconcilable conflict between the provisions of this First Amendment and the provisions of the Agreement, the former shall prevail. Notwithstanding the foregoing sentence, nothing in this First Amendment alters, modifies or waives State's rights or Company's and LMAC's respective obligations under Sections 3.1(b)(viii) and (ix), 3.3, 5.1, 5.2, 5.3, 5.4, 5.8(f), 6.2 (except the date for submitting the proposed

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Acceptance Test Plan), 6.3, 6.4, 7.4(b), (c) and (d), 7.7, 7.8, 8.2, 9.2, 15.1 and 15.4 of the Agreement.

IN WITNESS WHEREOF, the parties, intending to be legally bound, have executed this Agreement on the date first written above.

**State:**

**THE STATE OF MINNESOTA,  
acting by and through:**

**The Commissioner of the  
Department of Transportation**

By: James N. Denn  
James N. Denn, Commissioner, Minnesota  
Department of Transportation

**and**

**The Commissioner of the  
Department of Administration**

By: Elaine S. Hansen  
Elaine S. Hansen, Commissioner, Minnesota  
Department of Administration

Approved as to form and execution:

By: Donald J. Muetting  
Donald J. Muetting, Esq., Assistant Attorney General,  
State of Minnesota

By: Scott Wilensky 10-19-88  
Scott Wilensky, Esq., Assistant Attorney General,  
State of Minnesota

**Company:**

**ICS/UCN LLC,  
a Colorado limited liability company**

By: Universal Communication Networks, LLC,  
a Colorado limited liability Company,  
its Manager

By: 


Name: Dr. STROCK

Title: PRESIDENT

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**LMAC:**

**LMAC, LLC,  
a Massachusetts limited liability company**

By:   
Name: Carmine F. O'Brien  
Title: PRESIDENT

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

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Minnesota Equal Access Network  
Services, Inc. a Minnesota Corporation,  
and Minnesota Telephone Association,  
Incorporated., a Minnesota Corporation,

CASE TYPE:

COURT FILE NO.

**COMPLAINT**

Plaintiffs,

v.

State of Minnesota, by James Denn,  
Commissioner of the Minnesota  
Department of Transportation, and Elaine  
Hanson, Commissioner of the Minnesota  
Department of Administration.

Defendants.

---

Plaintiffs, for their Complaint against Defendants, state and allege as follows:

**PARTIES**

1. Plaintiff, Minnesota Equal Access Network Services, Inc. ("MEANS") is a Minnesota corporation with its principal place of business at 10300 Sixth Avenue North, Plymouth, Minnesota, 55441. MEANS, through its subsidiaries, provides both wholesale and retail telecommunications services within and between communities throughout Minnesota, including communities located along the interstate freeway rights-of-way in Minnesota.

2. Plaintiff, Minnesota Telephone Association, Incorporated ("MTA") is a Minnesota corporation with its principal place of business at 1650 Minnesota World Trade Center, 30 East Seventh Street, Saint Paul, Minnesota, 55101. The members of

MTA provide both wholesale and retail telecommunications services within and between communities throughout Minnesota, including communities located along the interstate freeway rights-of-way in Minnesota.

3. Defendant James Denn ( "Denn") is the Commissioner of Transportation for the State of Minnesota. Defendant Denn is responsible for the operation of the Minnesota Department of Transportation ("MnDOT") and for the performance by MnDOT of its statutory duties as set forth in Minn. Stat. § 161B. et seq.

4. Defendant Elaine Hanson ("Hanson") is the Commissioner of Administration for the State of Minnesota. Defendant Hanson is responsible for the operation of the Minnesota Department of Administration ("MnDOA") and for the performance by MnDOA of its statutory duties as set forth in Minn. Stat. § 16B. et seq.

#### **JURISDICTION AND VENUE**

5. Pursuant to the Uniform Declaratory Judgement Act, Minn. Stat. § 555 et seq., Plaintiffs seek a Declaratory Judgement as to the rights and responsibilities of the State of Minnesota and Defendants Denn and Hanson under a certain purported contract captioned "*Agreement To Develop And Operate Communications Facilities By And Among The State Of Minnesota Acting By and Through the Commissioner of the Department of Transportation and the Commissioner of the Department of Administration and ICS/UCN, LLC, a Colorado Limited Liability Company, and Stone and Webster Engineering Corporation, a Massachusetts Corporation*" (herein the "Agreement") and an Order permanently enjoining Defendants from performing or enforcing the Agreement. A true and correct copy of the Agreement (not including

exhibits to the Agreement other than Table H of Exhibit A) is attached as Exhibit A to this Complaint and incorporated as if fully set forth herein.

6. This court has jurisdiction of the claims set forth herein and the case is properly venued in this Court pursuant to Minn. Stat. § 542.03.

### **STATEMENT OF FACTS**

7. On February 8, 1996, the Federal Telecommunications Act of 1996 (the "1996 Act") was enacted by the United States Congress. The 1996 Act established a broad Federal policy to promote the development of competition in the telecommunications industry, including Section 253 which established requirements relating to regulation of rights-of-way by states and to use of the rights-of-way by competitors. Under the 1996 Act, the Federal Communications Commission ("FCC") and the Federal Courts have primary responsibility for implementation of Section 253 of the 1996 Act.

8. On February 20, 1996 MnDOT issued a Request for Proposal for Public-Private Partnership in the Development of Communications Infrastructure (the "RFP"). The RFP was intended to obtain for the State free fiber optic telecommunications capacity (for use by both MnDOT and other State agencies) in exchange for the barter by the State of an exclusive right to use the interstate freeway rights-of-way for fiber optic communications. The RFP reads in part:

#### **"Goal**

Mn/DOT wants to develop a public-private partnership venture with communications infrastructure providers and operators to exclusively enter, install and develop communications primarily within state freeway right of way, in exchange for providing operational communications capacity to the state.

## **Objectives**

- a) Construct and maintain a communication network for much of the area of the state as possible.
- b) Provide Mn/DOT with communication capacity for the future.
- c) Provide communications access to other government entity locations throughout the state.
- d) Provide the successful bidder exclusive rights to Mn/DOT freeway right-of-way for commercial communication infrastructure purposes.

### **1. Overview**

...

Mn/DOT wishes to barter exclusive rights to freeway right-of-way in exchange for capacity to satisfy immediate and future state needs.

...

In turn Mn/DOT is willing to consider providing:

- Long-term access to certain Mn/DOT right of way including the exclusive access for communications infrastructure purposes, to the 1000 miles of freeway, both linear and spot location throughout the state.

...

### **2. Guidelines for Fiber Optics**

Mn/DOT will consider providing exclusive use of its freeway right of way to the successful proposer. No other private use fiber optic lines will be permitted on the freeways other than the system that now exists along I-94 between St. Cloud and Maple Grove."

The RFP clearly expresses MnDOT's intent to grant an exclusive right to use the interstate freeway rights-of-way in Minnesota in exchange for communications capacity to be provided to both MnDOT and to other agencies of the State.

9. On or about April 26, 1996, proposals responding to the RFP were submitted to MnDOT by several interested parties, including the Company and MEANS. On or about June 4, 1996, the Company informed MnDOT that Stone & Webster Engineering Corporation ("S & W") would participate along with the Company.

On or about August 14, 1996, MnDOT selected the Company, along S & W, as the party with whom MnDOT would pursue negotiations.

10. In September, 1996 and November, 1997, Plaintiff MTA informed the State, in writing, of conflicts between the terms of Section 253 of the 1996 Act that prohibit barriers to competition, discriminatory regulation of competitors, and the State's indicated intention to grant exclusive use of the interstate freeway rights-of-way.

11. On or about December 23, 1997, the State and the Company and S&W entered into the Agreement.

12. On December 29, 1997, the State filed a Petition with the FCC seeking a declaration by the FCC that the Agreement does not violate the 1996 Act. That matter is pending before the FCC. Plaintiffs are not requesting that the Court address issues under the 1996 Act that have been presented to the FCC.

13. Section 11.1(a) and (b) of the Agreement contains a covenant by the State to not grant to any person other than the Company a license, permit, or other right to construct or operate a fiber optic communications line along ("longitudinally ") within the interstate freeway rights-of-way for no less than ten years after completion of construction. Section 11.1(a) and (b) reads in part:

(a) State hereby agrees that it shall not grant a license, permit or other right to any other party to construct, install and operate a fiber optic communication system longitudinally within Interstate freeway right-of-way location specifically identified on Table F of Exhibit A, including any portion of the Optional Phase 1 Routes for which the company validly exercises its option in accordance with Section 5.11 (a) ....

(b) The right granted under subsection (a) above shall expire on the first to occur of (i) ten years after the last Acceptance Date for Phase 1 or (ii) termination of this agreement for any reason."

14. Section 11.1(e) of the Agreement purports to grant to the Company an exclusive right of negotiation to extend its period of exclusive occupancy and operation of fiber optic facilities within the interstate freeway rights-of-way for an additional ten years. Section 11.1(e) reads in part:

"If at any time during the period commencing ten years and expiring 20 years after the last Acceptance Date for Phase 1 State desires to offer the opportunity to place an additional fiber optic communication system within any Freeway Right of Way location specifically identified on Table F of Exhibit A . . . Company shall have a first right of exclusive negotiation with the State for the design, permitting and installation of such fiber optic system."

15 The Company's exclusive right to use of the interstate freeway rights-of-way is subject only to the Company's obligation (under Section 5.12) to allow one-time installation of fiber optic facilities owned by another person limited to installation simultaneously with the Company's facilities ("collocation") and the obligation (under Section 7.7) to allow other persons to lease communications capacity from the Company, both at "nondiscriminatory" rates and charges to be determined by the Company (Section 7.7).

16. In return for the State's covenant to prohibit all persons (other than collocators) from installing or operating fiber optic facilities in the interstate freeway rights-of-way, the Company covenants to provide the State with cost free use of a substantial part of the communications capacity of the Company's fiber optic network. Section 3.3 of the Agreement reads in part:

"In exchange for the rights granted to company and S & W in Section 3.1 and elsewhere in this Agreement, Company (and S & W, but only to the extent of the services of S & W expressly provided in this Section) shall provide to State, without any charge, cost or expense whatsoever to State except as expressly provided in this section, the capacity and services set forth in this Section."

17. The communications capacity to be provided to the State is very substantial and greatly exceeds the communications capacity needed to support any facilities required for operating the interstate freeways. The State intends to use that capacity to meet the communications needs of any State agencies and political subdivisions of the State and to supply the State communications network formerly known as "MNet" and now known as the "state information infrastructure." See, Laws 1998, Chapter 359, Section 9.

18. Although the State's Petition before the FCC remains pending, the Company is taking steps to prepare for the construction of the fiber optic network during 1998, including: 1) negotiating with one or more other entities for the collocation of those entities' fiber optic facilities and for the sharing of the Company's costs of installation; 2) staking of portions of the interstate freeway routes to be used for the installation of the Company's fiber optic facilities; and 3) seeking bids from construction contractors.

19. The interstate freeway rights-of-way are the best, most direct, and most easily maintained sites for installation of fiber optic cable and related communications equipment to be used for communications between and within communities located along the interstate freeways.

20. The exclusive access provisions of the Agreement will deny Plaintiffs, other telecommunications service providers, and other private parties the opportunity to use interstate freeway rights-of-way to install their own fiber optic facilities for the next ten, and up to twenty, years.

21. The exclusive access provisions of the Agreement will also deprive consumers of telecommunications services within communities located along the interstate freeways the benefit of multiple providers of fiber optic facilities along interstate freeway rights-of-way for the next ten, and up to twenty, years.

### CAUSES OF ACTION

**Count 1. The Agreement Is Void and Of No Force or Effect Because It Would Impair or Eliminate the Police Power and Public Policy Discretion of the Minnesota Legislature.**

22. Use of trunk highway and other rights-of-way, including use by telephone, telecommunications and other utilities, is a matter of vital public interest. Minneapolis Gas Co. v Zimmerman, 91 NW 2d 642, 649 (Minn. 1958). Accommodating use of rights-of-way for telecommunications has become even more a matter of vital public interest since passage of the 1996 Act.

23. The decision whether and how to allow use of rights-of-way, including freeway rights-of-way, is a matter that is subject to the police power and public policy discretion of the Minnesota Legislature. In Laws, 1990, Chapter 426, Section 7, the Minnesota Legislature enacted a specific authorization to install telecommunications facilities along the interstate freeway rights-of-way between Plymouth and Saint Cloud.

24. The Minnesota Legislature has addressed the subject of use of highways and/or other rights-of-way in numerous enactments including Minn. Stat. § 161.45, which grants operating utilities access to trunk highways, and in Laws, 1997, Chapter 123, a comprehensive statute setting forth the rights and responsibilities of local governmental units with respect to rights-of-way.

25. MnDOT and Defendant Denn have only such powers and authority as have been delegated by the Legislature.

26. Neither Minn. Stat. Chapters 160 and 161, nor any other provision of Minnesota Statutes, contains any authority, express or implied, to enable MnDOT or Defendant Denn to impair or eliminate for the next ten, and up to twenty, years the inalienable police power and public policy discretion of the Minnesota Legislature relating to use of the freeway rights-of-way for installation of fiber optic facilities.

27. Defendant Denn's attempt to do so by entering into the Agreement is unauthorized and contrary to public policy. The Agreement is therefore void and of no force or effect, and confers no valid rights to occupy or use the interstate freeway rights-of-way.

28. As a result, the Agreement has created a controversy or developing controversy which should be resolved, pursuant to the Uniform Declaratory Judgement Act, Minn. Stat. § 555.01 et seq., by judgement of this Court declaring that the Agreement is contrary to public policy and therefore void and of no force or effect and that it confers no valid rights to occupy or use the freeway rights-of-way.

29. Unless the Agreement's purported impairment of the Legislature's police power is declared invalid and unenforceable, and further implementation and enforcement of the Agreement is enjoined by Order of this Court, Plaintiffs will suffer irreparable injury because they will be denied non-discriminatory access to the freeway rights-of-way. Consumers of telecommunications services within communities located along the freeway rights-of-way will also be irreparably injured because they will be

deprived of the opportunity to receive service from multiple sources of fiber optic facilities.

**Count 2. The Agreement Is Void and Of No Force or Effect Because It Would Impair Or Eliminate the Ability of MnDOT Commissioners To Fulfill Their Statutory Obligations.**

30. Pursuant to Minn. Stat. § 161.45, utilities, including telephone and telecommunications companies, are generally allowed to use the trunk highway rights-of-way for installation and operation of utility facilities.

31. The decision whether and how to allow such use of interstate freeway rights-of-way is a matter that calls for the exercise of discretion by the Commissioner of MnDOT, subject to the requirements of applicable Statutes and validly promulgated Regulations.

32. Sections 11.1(a) and (b) of the Agreement set forth the covenant that would prevent MnDOT Commissioners from granting to any other person any right to construct, install, or operate fiber optic facilities in interstate freeway rights-of-way for the next ten, and up to twenty, years, irrespective of the public benefit that may result from such use.

33. Neither Minn. Stat. Chapters 160 and 161, nor any other provision of Minnesota Statutes, contains any authority, express or implied, to enable Defendant Denn to impair or eliminate for the next ten, and up to twenty, years the regulatory and public policy discretion of MnDOT Commissioners.

34. Defendant Denn's attempt to do so by entering into the Agreement is unauthorized and contrary to public policy. . See, Butler v. Hatfield, 152, NW 2d 484

(Minn. 1967). The Agreement is therefore void and of no force or effect, and confers no valid rights to occupy or use the interstate freeway rights-of-way.

35. As a result, the Agreement has created a controversy or developing controversy which should be resolved, pursuant to the Uniform Declaratory Judgement Act, Minn. Stat. § 555.01 et seq., by judgement of this Court declaring that the Agreement is contrary to public policy and therefore void and of no force or effect and that it confers no valid rights to occupy or use the freeway rights-of-way.

36. Unless the Agreement 's purported impairment of MnDOT's future regulatory discretion is declared invalid and unenforceable, and further implementation and enforcement of the Agreement is enjoined by Order of this Court, Plaintiffs will suffer irreparable injury because they will be denied non-discriminatory access to the freeway rights-of-way. Consumers of telecommunications services within communities located along the freeway rights-of-way will also be irreparably injured because they will be deprived of the opportunity to receive service from multiple sources of fiber optic facilities.

**Count 3. The Grant of a Permit to the Company Violated of Minn. Stat. § 161.45, Subd.1 and Minn. Rule 8810.3300 Because the Preconditions Required By That Rule Are Not Met.**

37. Minn. Stat. § 161.45, subd. 1 provides that telephone lines may be "constructed, placed or maintained" along highways "only in accordance with such rules as may be prescribed by the commissioner [of MnDOT]." Minn. Stat. § 161.45, subd. 1 reads in part:

[T]elephone or telegraph lines ... which ... may be constructed, placed, or maintained across or along any trunk highway, ... may be so maintained or hereafter constructed only in accordance with such rules as may be prescribed by the commissioner who shall have power to prescribe and

enforce reasonable rules with reference to the placing and maintaining along, across, or in any such trunk highway ....

38. Minn. Rules 8810.3100 et seq., adopted as of July 31, 1983, establish terms and conditions under which utilities shall be granted permits for construction using trunk highways rights-of-way, including interstate freeway rights of way. Minn. Rule 8810.3300, subp. 4 requires, "a showing that any other utility location is extremely difficult and unreasonably costly to the utility consumer" as a precondition to the installation within the access restricted area of the freeway right-of-way ("control of access lines"), except for "utility lines which service facilities required for operating the interstate highway." Minn. Rule 8810.3300, subp. 4, reads in part:

"Utilities along the interstate highways shall be located outside the control-of-access lines except as outlined below. ... The restrictions of this sub part shall not apply to utility lines which service facilities required for operating the interstate highway.

There may be extreme cases where, under strictly controlled conditions, a utility may be permitted inside the control-of-access lines along an interstate highway. In each case there must be a showing that any other utility location is extremely difficult and unreasonably costly to the utility consumer, that the installation on the right-of-way of the interstate highway will not adversely effect the design, construction, stability, traffic safety, or operation of the interstate highway and that the utility can be serviced without access from through traffic road beds, loops, or ramps."

Minn. Rules 8810.3100 et seq. have not been amended pursuant to Minn. Stat. § 14.05 et seq. and remain in full force and effect .

39. The vast majority of the fiber optic facilities and related capacity to be installed by the Company along the interstate freeway will not be "utility lines which service facilities required for operating the interstate highway." As a result, Minn. Rule 8810.3300, subp. 4 requires specific showings, including a showing that "any other

location is extremely difficult and unreasonably costly” as a precondition to MnDOT allowing the Company to use the interstate freeway rights of way.

40. MnDOT did not require the Company to show that installation of its proposed fiber optic facilities at any location other than the freeway rights-of-way would be extremely difficult and unreasonably costly. To the contrary, the State has repeatedly asserted in its December 29, 1997 Petition to FCC, in its subsequent Reply Comments to the FCC, and in testimony before the Minnesota Legislature, that numerous other locations are feasible and equivalent alternatives to use of the interstate freeway rights-of-way for the installation of fiber optic facilities.

41. Absent the showing required by Minn. Rule 8810.3300, subp. 4., MnDOT and Defendant Denn did not have authority to grant the Company a permit to install fiber optic facilities along the interstate freeway rights of way. As a result, Defendant Denn’s covenant to do so and the grant of permits to the Company pursuant to the Agreement are unauthorized and therefore void and of no force or effect.

42. As a result, the Agreement has created a controversy or developing controversy which should be resolved, pursuant to the Uniform Declaratory Judgement Act, Minn. Stat. § 555.01 et seq., by judgement of this Court declaring that the Agreement is contrary to public policy and therefore void and of no force or effect and that neither the Agreement nor any permits granted pursuant to the Agreement confer any valid rights to occupy or use the freeway rights-of-way.

43. Unless the unauthorized grant of permits to occupy the freeway rights-of-way is declared invalid and unenforceable, and further implementation or grant of permits are enjoined by Order of this Court, Plaintiffs will suffer irreparable injury

because they will be denied non-discriminatory access to the freeway rights-of-way. Consumers of telecommunications services within communities located along the freeway rights-of-way will also be irreparably injured because they will be deprived of the opportunity to receive service from multiple sources of fiber optic facilities.

**Count 4. The Agreement Is Invalid Because It Would Preclude Consideration of Applications By Other Fiber Optic Providers Under Minn. Rule 8810.3300 In Violation Of Minn. Stat. § 161.45, Subd. 1 and that Rule.**

44. Minn. Stat. § 161.45, subd. 1 requires that use of trunk highway rights of way, including interstate freeway rights of way, be determined pursuant to rules promulgated by the commissioner of MnDOT. Minn. Rule 8810.3300, subp. 4 requires that MnDOT review each application by a utility for a permit to install facilities along a interstate freeway right-of-way to determine on the merits of the application whether it shows "that any other utility location is extremely difficult and unreasonably costly to the utility consumer" and whether a permit for installation should be granted.

45. Section 11.1 of the Agreement purports to express the State's covenant for the next ten, and up to twenty, years to not grant to any other person a license, permit, or other right to install fiber optic facilities within the interstate freeway right of way, regardless of the difficulty to the utility and the cost to utility consumers.

46. The State's purported covenant to exclude others from installing fiber optic facilities along the interstate freeway rights-of-way for the next ten, and up to twenty, years, violates the requirements of Minn. Stat. Section 161.45, subd. 1 and conflicts with Mn DOT's obligation to enforce and administer MnDOT's Rules, including Rule 8810.3300.

47. As a result, the Agreement, including the State's purported covenant to exclude others from use of the interstate freeway rights-of-way regardless of circumstances, and the related right of installation granted to the Company are void and of no force or effect.

48. As a result, the Agreement has created a controversy or developing controversy which should be resolved, pursuant to the Uniform Declaratory Judgement Act, Minn. Stat. § 555.01 et seq., by judgement of this Court declaring that the Agreement is contrary to public policy and therefore void and of no force or effect and that it confers no valid rights to occupy or use the freeway rights-of-way.

49. Unless the Agreement 's purported covenant to not permit use, regardless of circumstances, is declared invalid and unenforceable, and further implementation and enforcement of the Agreement is enjoined by Order of this Court, Plaintiffs will suffer irreparable injury because they will be denied non-discriminatory access to the freeway rights-of-way. Consumers of telecommunications services within communities located along the freeway rights-of-way will also be irreparably injured because they will be deprived of the opportunity to receive service from multiple sources of fiber optic facilities.

**Count 5. Granting The Competitive Advantage of Exclusive Use of the Interstate freeway Right-of-way Exceeds MnDOT Authority Under Minn. Stat. Ch. 161.**

50. MnDOT's authority to allow use of sub-surface areas of the state highway right-of-way is set forth in Minn. Stat. § 161.433, which reads in part:

Subdivision 1. The commissioner of transportation may lease or otherwise permit the use of the air space above and subsurface area below the surface of the right-of-way of any trunk highway, ... where the land is owned in fee by the state for trunk highway

purposes when the use will not impair or interfere with the use and safety of the highway. The lease, permit or other agreement may contain such restrictive clauses as the commissioner deems necessary in the interest of safety and convenience of public travel and other highway purposes. ...

51. The Agreement illegally discriminates against other potential users of the interstate freeway rights-of-way in order to fulfill the State's intent to provide substantial economic benefits on the Company and thereby improve the State's bargaining position in bartering use of interstate freeway right-of-way access for free communications capacity.

52. Defendant Denn does not have authority under Minn. Stat. Chapters 160 and 161 or other provision of Minnesota Statutes to discriminate against some potential users of interstate freeway rights-of-way for purposes unrelated to the safety and convenience of the public or other highway purposes. Defendant Denn's attempt to do so by entering into the Agreement is unauthorized and therefore unlawful and of no force or effect, and no valid rights to occupy or use the interstate freeway rights-of-way may be obtained under the Agreement.

53. As a result, the Agreement has created a controversy or developing controversy which should be resolved, pursuant to the Uniform Declaratory Judgement Act, Minn. Stat. § 555.01 et seq., by judgement of this Court declaring that the Agreement is contrary to public policy and therefore void and of no force or effect and that it confers no valid rights to occupy or use the freeway rights-of-way.

54. Unless the Agreement 's purported discriminatory grant of economic benefit for non-highway purposes is declared invalid and unenforceable, and further implementation and enforcement of the Agreement is enjoined by Order of this Court,

Plaintiffs will suffer irreparable injury because they will be denied non-discriminatory access to the freeway rights-of-way. Consumers of telecommunications services within communities located along the freeway rights-of-way will also be irreparably injured because they will be deprived of the opportunity to receive service from multiple sources of fiber optic facilities.

**Count 6. The Agreement to Exclude Consideration of Other Fiber Optic Providers Violates the MnDOT Guideline Submitted to and Approved by the Federal Highway Administration.**

55. On February 8, 1988, revised rules were adopted by the Federal Highway Administration ("FHWA"), 23 C.F.R. Part 645, Subpart B, which enabled individual state highway agencies, including MnDOT, to adopt plans and procedures for allowing use of federal highways, including interstate freeways.

56. Pursuant to 23 C.F.R. § 645.209 (c) (1), MnDOT submitted to the FHWA an accommodation policy, which was reviewed by the FHWA as provided in 23 C.F.R. § 645.215 and approved by the FHWA.

57. The plan approved by FHWA is contained in a MnDOT Policy Position Statement and MnDOT Policy Guideline, both dated July 27, 1990 (collectively the "MnDOT Policy"). The MnDOT Policy was not promulgated in accordance with the requirements of the Minnesota Administrative Procedure Act for Promulgation of Rules, Minn. Stat. § 14.05 et seq.

58. To the extent MnDOT's Policy has legal effect, it provides that all applications for access to federal rights-of-way will be evaluated on the basis of the standards and criteria set forth therein. The MnDOT Policy addresses, among other matters, longitudinal placement of underground utility facilities on interstate freeway

rights-of-way in Section VI, and establishes certain requirements applicable to such installations. The MnDOT Policy does not authorize MnDOT to limit use of interstate freeway rights-of-way to a single provider of fiber optic facilities for ten, and up to twenty, years. To the extent MnDOT's Policy has legal effect, it obligates the State to enforce and administer the MnDOT Policy in good faith and in a fair and evenhanded manner.

59. No valid rights to occupy or use the interstate freeway rights-of-way may be obtained under the Agreement because the Agreement violates the MnDOT Policy and is therefore void and of no force or effect.

60. As a result, the Agreement has created a controversy or developing controversy which should be resolved, pursuant to the Uniform Declaratory Judgement Act, Minn. Stat. § 555.01 et seq., by judgement of this Court declaring that the Agreement is contrary to public policy and therefore void and of no force or effect and that it confers no valid rights to occupy or use the freeway rights-of-way.

61. Unless the Agreement 's purported limitation of interstate freeway use to a single provider in violation of the MnDOT Policy is declared invalid and unenforceable, and further implementation and enforcement of the Agreement is enjoined by Order of this Court, Plaintiffs will suffer irreparable injury because they will be denied non-discriminatory access to the freeway rights-of-way. Consumers of telecommunications services within communities located along the freeway rights-of-way will also be irreparably injured because they will be deprived of the opportunity to receive service from multiple sources of fiber optic facilities.


WHEREFORE, Plaintiffs pray that this Court enter judgement awarding Plaintiffs and the following relief against Defendants and each of them:

1. Declaring that Defendants Denn and Hanson were not authorized to bind the State, MnDOT, or MnDOA to the exclusionary terms of Agreement, and further declaring that the Agreement and any purported permits or authorizations to occupy the freeway rights-of-way issued pursuant to the Agreement are therefore void and of no force or effect.
2. Directing Defendants Denn and Hanson to cause MnDOT and MnDOA to cease performance of the obligations purportedly set forth in the Agreement, and further directing Defendant Denn to cause MnDOT (a) to withdraw any permit or other authorization heretofore granted to the Company pursuant to the terms of the Agreement and (b) to refrain from granting to the Company any further permit or authorization to proceed with the project contemplated by the Agreement.
3. For such other and additional relief as the Court deems just and reasonable.

DATED: June 8, 1998

MOSS & BARNETT, P.A.

  
Richard J. Johnson #51676

  
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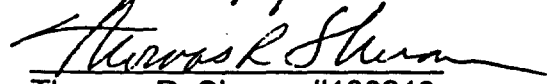
### ACKNOWLEDGEMENT

The undersigned hereby acknowledges that costs, disbursements, and reasonable attorney and witness fees may be awarded pursuant to Minn. Stat. § 549.21, subd. 2, to the party against whom the allegations on this pleading are asserted.

Dated: June 8, 1998

MOSS & BARNETT, P.A.

  
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